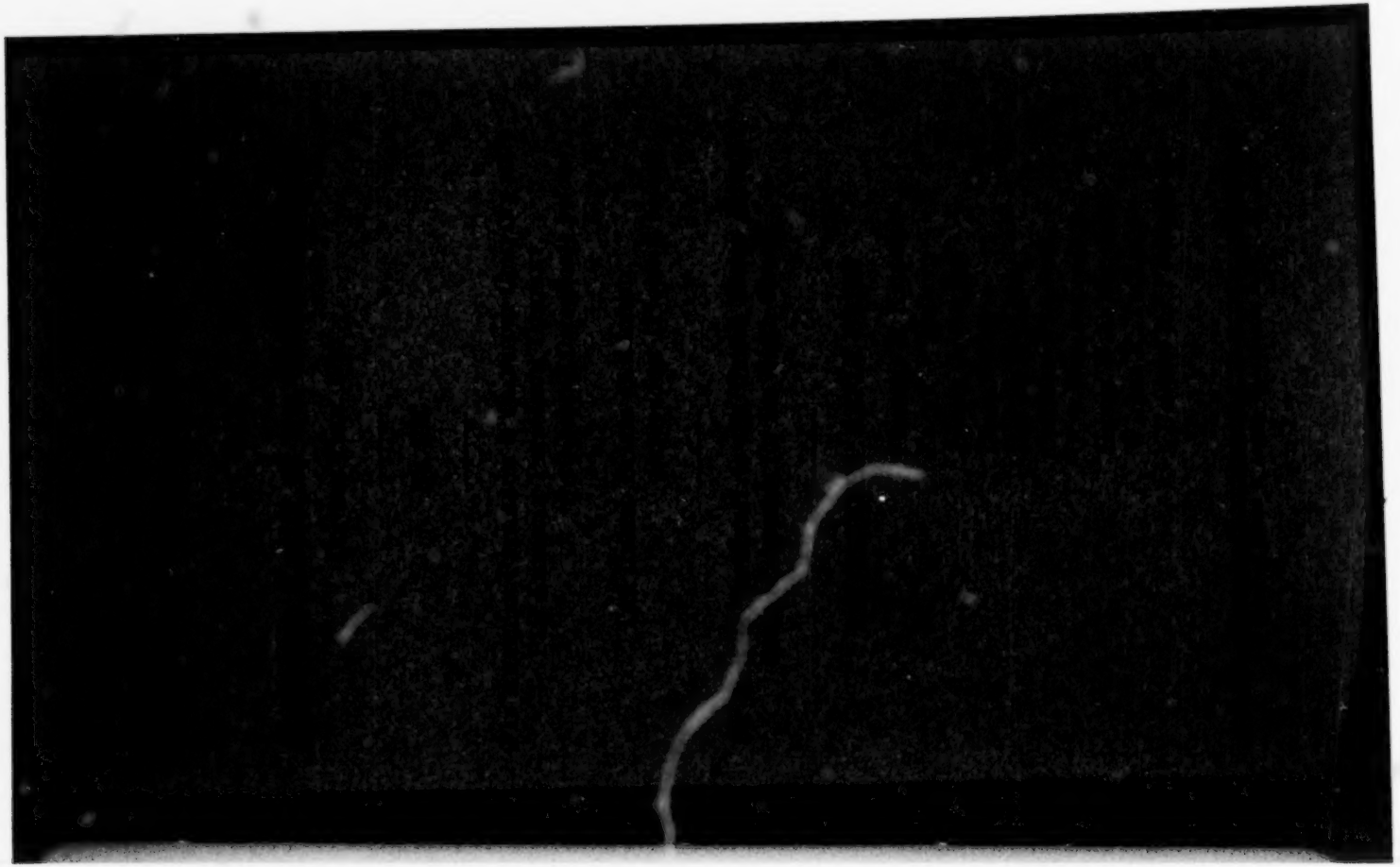

SUBJECT INDEX.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 305.

PAN AMERICAN PETROLEUM & TRANSPORT COMPANY and PAN AMERICAN PETROLEUM COMPANY,
Petitioners (Defendants below),
v.
THE UNITED STATES OF AMERICA,
Respondent (Plaintiff below).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF

We ask the Court's permission to call attention to the following points:

I.

As to the Interpretation of the Law of June 4th, 1920.

Since the filing of briefs in this case the Circuit Court of Appeals, Eighth Circuit, on September 28, 1926, rendered opinion in the case of *United States v. Mammoth Oil Company,* which case involved a lease of

Naval Reserve No. 3, known as the Teapot Dome, and a contract, incidental to said lease, for the construction, in exchange for crude oil from that reserve, of storage facilities at the naval station, Portsmouth, New Hampshire, and the filling thereof with fuel oil. In that case the Circuit Court of Appeals, Eighth Circuit, Kenyon and Van Valkenburgh, Circuit Judges, and Cant, District Judge, opinion by the first named, said, on the subject of the authority of law for such a lease and contract, the following:

"II.

"LEGALITY OF THE LEASE AND CONTRACT

"These instruments were made under the authority of the Act of Congress of June 4, 1920 (hereinbefore set out). The Government contends that this Act is not an independent Act; is dependent on other general statutes preceding it, and must be construed in connection therewith. Appellees' contention is that the Act is full and complete, covering without reference to other statutes the method of doing the things therein provided. The Act of June 4, 1920, deals entirely with the naval petroleum reserves. These had been only incidentally referred to, if not practically excluded from the Act of February 25, 1920. The purpose of the Act of June 4, 1920, was to preserve the oil in these naval reserves for the benefit of the Government in such manner as Congress at that time deemed wise, viz., to place the matter almost exclusively in the hands of the Secretary of the Navy. It is of vital importance that the Government's oil in these reserves shall not be drained away for the benefit of private enterprise, but that it shall be preserved in the interest of national defense. This Act is as broad as an Act dealing with this subject could well be. It con-

fers upon the Secretary of the Navy wide discretion as to administering the naval reserves, directing him to take possession of the properties within the same as are or may become subject to the control and use by the United States for naval purposes and 'to conserve, develop, use and operate' these properties 'in his discretion.' He may do this directly or he may do it by 'contract, lease or otherwise,' and he is further given the right to use the oil that may be secured by contract, lease or otherwise, or to 'store, exchange or sell' the same.

"Counsel for appellees argue that the language of this Act compels the Secretary of the Navy to employ all of the methods suggested, and that the term 'in his discretion' applies to the method by which he shall 'conserve, develop, use and operate.' We do not agree with this view. It is apparent that, although the conjunction 'and' is used, Congress intended that the Secretary should employ any or all of these methods as his discretion should dictate. Certainly if the oil can be properly conserved in the ground the Secretary of the Navy is not under compulsion to develop the properties. What he does must be for the benefit of the United States. That is the limitation of his discretion. If he shall determine that the oil cannot be properly conserved within the ground, then he has the right to develop, use and operate the properties directly or by contract, lease or otherwise. Having decided in the exercise of a wise discretion that it is for the interest of the Navy, and therefore of the United States, to develop and operate the properties, he may do this directly, which will require the expenditure of money, or he may do it by contract or by lease. Having made a lease, which in its very nature implies the taking of the oil from the ground, and such oil being crude and not fuel oil in proper condition to be used by the Navy, he may store it. He may sell it, in which case the proceeds must be turned

into the Treasury of the United States or he may exchange the same. While appellant concedes that the right to exchange crude oil for fuel oil is proper and legal, it denies the right to exchange the crude oil for storage facilities for fuel oil.

"If the Act of June 4, 1920, as it seems clear it did, authorize the Secretary of the Navy to store the fuel oil, it would follow that it could be stored at established fuel depots, and if none such existed then places for the storage of the oil would have to be fixed and provision made for storage tanks. It would not be an arbitrary discretion exercised by the Secretary of the Navy if he in exchanging royalty crude oil for fuel oil provided also for an exchange of crude oil for storage tanks. There was no restriction upon the Secretary of the Navy as to the amount of oil that he might have extracted from the ground either directly or by contract or lease. The argument does not appear to us sound that under this Act it must be held that the Secretary of the Navy could exchange oil for anything, such as battleships or airplanes, or else that it was limited to exchange of crude oil for fuel oil. If such limitation was intended it would have been a simple matter to have expressed it in the Act. It is not for the Court to supply the same. The purpose of the Act was to protect the oil of the Government. It would not be in consoance with the purpose of the Act to exchange the oil for battleships or airplanes, or land to raise a food supply for the Navy, or materials to weave cloth for the uniforms of marines, but it would be consonant with the purpose of the Act to provide storage places for the oil. And under the Act express authority is given to store the oil and gas products received from the Naval Reserves. It may be that the use of the oil certificates provided in the lease in payment for the construction of storage tanks was intended to prevent the proceeds of the sale of the oil going into the Treasury of the United States. If

Congress, however, had passed an Act that permitted this, then the Navy Department had the right to exercise the power so granted.

"Nor do we think the Act invaded the exclusive right of Congress to appropriate funds for naval uses. There is a distinction between the appropriation of moneys by Congress, and the use of Government property incidental to administration under an adequate grant of authority. We are convinced that the appropriation of $500,000.00 is not a limitation upon the construction of storage tanks. Certainly it does not limit the amount of royalty oil to be exchanged for fuel oil. The appropriation ended July 1, 1922, but the right to arrange for the extraction of oil in the method provided by the Act was not limited to July 1, 1922. If the Secretary of the Navy attempted to develop and operate the naval reserves directly this appropriation would undoubtedly be necessary to commence such operations. It would have been necessary then to call upon Congress for further money, but the appropriation was not necessary where the properties were to be developed by contract or lease. If the Secretary of the Navy should find it essential to immediately develop a naval reserve in order to prevent waste of the oil or depletion thereof by wells on adjacent property, and said oil could not be used for the current needs of the Navy, it would be his duty to store the same or sell or exchange it in his discretion. If it could not be sold it must be stored, and the appropriation of $500,000.00 under circumstances easily imaginable and entirely possible would obviously be inadequate to provide storage facilities, and were Congress not in session no relief from that source could be found. We think the appropriation in the Act referred to expenditures made necessary if the Secretary in his discretion entered into a direct development and operation of the properties.

"That the Act of June 4, 1920, even though a

rider to an appropriation bill, was complete in itself, and that it did not repeal, nor was it dependent on, other Acts with relation to the public lands, is our conclusion. It constitutes an exception thereto. In *Washington* v. *Miller,* 235 U. S. 422, 428, the Supreme Court said: 'Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.' In *Witte v. Shelton et al.,* 240 Fed. 265, 268, this Court said: 'Specific legislation upon a particular phase of a single subject is not affected by a subsequent law relating to a general subject which neither refers to the earlier law nor is repugnant to nor inconsistent with it, but the two laws must stand together, the former as the law of its specific phase of the subject, and the latter as the general law relating thereto. *Walla Walla City v. Walla Walla Water Co.,* 172 U. S. 1; *Townsend v. Little & Others,* 109 U. S. 504, 512; *Kepner v. United States,* 195 U .S. 100, 125; *Rodgers v. United States,* 185 U. S. 83, 87; *Hemmer v. United States,* 204 Fed. 898, 903; *United States v. Mathews,* 173 U. S. 381.

"This special statute, not repealing the general statutes, the two stand together, one as the law relating to a special thing, viz., the naval reserves,—the other relating to general public land matters. It was therefore unnecessary that there be competitive bidding or advertising as to the making of the lease and contract, and other statutes with relation to the method of transacting the general public business of the United States were not applicable to this situation, the special statute fully covering the situation.

"It is urged that the lease is void because the Secretary of the Navy had abdicated the powers conferred on him by the Act. This record shows

great activity on the part of Secretary Fall in leasing Naval Reserve No. 3, and more or less passivity on the part of the Secretary of the Navy. Fall's letter to Doheny of July 8, 1921, (hereinbefore set out) and Denby's letter to Fall of October 25, 1921, in which he said: 'That all leases and contracts, except as provided in paragraph 6, will be arranged and consummated by the Interior Department, copies(of some being furnished to the Navy Department as a matter of information and record only,' would seem to come close to the assumption of exclusive authority by the Secretary of the Interior, and an abdiction on the part of the Secretary of the Navy of the powers granted by the Act of June 4, 1920. The Executive Order of May 31, 1921, however, while giving great power to the Secretary of the Interior, did not of necessity remove absolutely the administration and control of these reserves from the Secretary of the Navy in such a way as to violate the Congressional Act. In fact, it seemed to retain just enough control in the Navy to be within the law of June 4, 1920. It provided that no general policy as to drilling or conserving lands located in a naval reserve should be changed or adopted except upon consultation, and in cooperation, with the Secretary or Acting Secretary of the Navy. The President had no authority to transfer from the Secretary of the Navy to the Secretary of the Interior powers which Congress had provided should be exercised by the former. The validity of this Executive Order does not seem to have been seriously questioned in the presentation of the case to this Court. It was proper, of course, for the Secretary of the Navy to act through competent subordinates. Of necessity this must be so. We conclude that enough control was exercised by the Secretary of the Navy through Admiral Robeson to preclude a court from holding that the entire power granted by the Act of June 4, 1920, to the

Secretary of the Navy had been assumed by the Secretary of the Interior.

"The Act of June 4, 1920, creates no power in the Secretary of the Navy to establish fuel depots. That is a matter for Congress, long so recognized. The lease, however, does not necessarily involve the establishment of fuel depots other than those existing. It does involve the providing of facilities for storage. Such storage might have been at fuel depots already established, and so construed the lease and contract are not open to the objection that by their terms they established fuel depots. Exceeding power granted does not destroy it. We are not satisfied that the acts contemplated by the lease were beyond the authority granted to the Secretary of the Navy, and the supplemental agreement must be considered as merely a necessary incident of the lease.

"The work thus far done in constructing storage facilities has been at the Portsmouth Navy Yard. The record does not disclose whether or not this Navy Yard was a fuel depot.

"The Circuit Court of Appeals for the Ninth Circuit in the *Pan-American Petroleum Co. et al.* v. *United States*, 9 Fed. (2d) 761, has held that contracts with reference to another naval reserve, executed under the authority of the same Act and involving a similar question of legality, were not authorized by the Act.

"With great respect for the ability and learning of that distinguished Court, we find ourselves unable to arrive at the same conclusion as to this lease and contract. That case is now in the Supreme Court of the United States and this legal question will there be settled. We content ourselves with saying that on this branch of the case, as at present advised, we are in accord with the conclusion reached by the trial Court, that the authority granted by the Act of June 4, 1920, is sufficient to authorize the lease and contract in question."

II.

As to the Exchange Power.

Our adversaries admit that the statute gave the Secretary power to exchange crude oil for fuel oil (Govt. Br., p. 209).

In the face of this admission, how can they successfully contest the right of the Transport Company to the credit of $1,986,142.47 (R. III, p. 1432) representing the cost price of fuel oil actually delivered by the Transport Company to the Government, and found as a fact by the District Court (*to which finding no assignment of error was made by the Government upon its cross appeal*) to have been

> "accepted and retained by the United States of America, and is still retained by it, and that the same was and is of value and benefit to the United States of America equal to the cost to the said defendant of furnishing and transporting the same as aforesaid" (R. III, 1427-8),

together with the further credit of $259,569.11, being interest thereon?

These credits were disallowed by the Court of Appeals.

Can any argument based upon the *Causey* and other land patent cases be of such force as to entitle the Government to retain this merchandise—this personal property—without allowing the Transport Company to be compensated for its value out of the royalty oils voluntarily delivered to the Transport Company by the Government?

And if this be—as we respectfully insist it must be—true, then does it not irresistibly follow that not

only under the language of the statute which we have before discussed, but by virtue of the Government's own interpretation of it, the Secretary had ample power to acquire by exchange, not merely this fuel oil, but as a corollary, the storage facilities, without which the fuel oil exchange could not have been effectuated?

The exchange power, while it could not be used to acquire paper dolls, jewelry, battleships, etc., certainly extended to the acquisition of those things which were clearly necessary or proper in the execution of the discretionary Naval Reserve and petroleum powers vested solely in the Secretary of the Navy. And each and every article acquired in the instant case, was thus necessary and proper.

III.

As to the Nature of the Contracts of April 25th and December 11th.

Our adversaries argue that they were not exchange contracts.

They do not, however, meet, or even allude to what we consider the controlling authority of

> *Postal Telegraph Cable Co.* v. *Railroad Co.*, 248 U. S., 471.

Unless that case can be distinguished, the claim that reference to pecuniary values for the purpose of ascertaining the quantum of goods to be included in an exchange contract deprives the contract of its quality as an exchange contract, must fail.

In this connection it may be noticed that whereas on page 215 they say that the contracts "use the language of sale rather than that of exchange," yet on page 218

they say that "if the transaction were to be a sale, it must be a sale for money."

If both these statements are correct, then the contracts were neither exchange contracts nor sale contracts.

At this point one may well inquire within what legal classification counsel would have the Court believe that these agreements should be included.

IV.

As to the "New Fuel Depot" Argument.

This is one of the principal bases for the attack made by the Government upon the legality of the contracts and upon the right of the Transport Company and the Petroleum Company to their respective credits.

But they make no attempt in their brief to controvert the *facts* which we have set forth at pages 145 to 151 of our principal brief.

And since these facts show that the contracts in question not only did not establish a new fuel depot at Pearl Harbor, but that a fuel depot had existed there for many years amplifications of which were provided for by these contracts, it is submitted that their entire argument, aside from the questions of law involved, fails for lack of foundation of fact.

We wish to comment on the statement in Government's brief, page 231, to the effect that Admiral Robison and Admiral Gregory testified "that the contracts called for the erection of complete fuel depots."

Admiral Robison's testimony was that "the project at Pearl Harbor was for a complete *unit*," etc.

Admiral Gregory said that the project covered by

the two contracts are what in the Department are called depots for coal or depots for other fuel; but that "as to whether they are really fuel depots, *it is a part of the station work*" (R. III, 576-7).

In other words, the testimony of both these gentlemen, instead of supporting our adversaries' statement, shows that the so-called new depot was nothing more than a new unit as a part of the existing depot or station.

V.

As to the Defendants' Credits.

We desire to make more emphatic than has been done in the principal brief the point that all of the expenditures of both defendants were not only found *as a fact* by the District Court to have been beneficial to the United States (R. III, pp. 1421, 1427-8), *but that the Government in its cross appeal did not assign error as to these findings of fact* (R. III, pp. 1549-6) but limited its alleged errors to those of law. The Court of Appeals based its decision as to these credits, entirely on legal grounds and did not suggest any error in the facts as found.

The land patent cases, *Causey* v. *United States,* etc., and the Court of Claims cases, *Sutton* v. *United States,* etc., furnish, as we have before seen, the basis of the Government's argument.

A recent decision of this Court (*United States* v. *Minn. Mut. Inv. Co.,* 46 Sup. Ct. Rep., at p. 503) emphasizes the point which we have made as to the ground on which the *Sutton* case should be distinguished, for it again draws the distinction between express contracts or contracts implied in fact, which alone can be enforced in the Court of Claims, and

claims "based merely on equitable considerations and implied in law," which cannot be thus enforced—but which, as we have elsewhere shown, are taken into consideration by courts of equity.

As to the land patent cases, the more that our adversaries attempt to evade our arguments, the more clearly, we submit, it appears that contracts made by the Government with private individuals, not under compulsory statutes but at arm's length, in which the minds of both parties voluntarily meet as to the propriety and sufficiency of the consideration and all other terms, are commercial contracts and are not within the class of land patents issued under compulsory statutes for the purpose of bringing about a development of the country, in connection with which, as this court has said:

> "Congress took no thought of their (*i. e.*, the land's) pecuniary value."

We have omitted to point out that the doctrine of the *Causey* case seems to have had its origin not in a judicial repudiation of the equitable maxim, but in the provisions of Section 2262 of the Public Land Laws, 8 Fed. Stat. Ann. 537.

This statute was subsequently repealed, but as originally enacted, it provided:

> "If any person taking such oath swears falsely in the premises, *he shall forfeit* the money which he may have paid for such land and all right and title to the same."

Under this section came the early case of *United States v. Minor*, 114 U. S., 233. See also *United States*

v. Detroit Lumber Co., 200 U. S., 321. But the influence of this forfeiture provision, though no longer technically effective, has evidently been important in the subsequent decisions upon which the Government relies.

The suggestion that *United States v. Debell* has been overruled by *Heckman v. United States* is unfounded, as will appear from an examination of the last part of the *Heckman* opinion, in which, although the parties who would be necessary in order to provide for a return of the consideration were not then before the Court, nevertheless it was expressly held that

> "On a proper showing as to any of the tranactions, *that provision can be made for a return of the consideration consistently with the cancellation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute,*"

steps would be taken to bring them before the Court.

The ruling in the *Debell* case is in line with that of this quotation.

In the present case no possible difficulty exists. All the parties are before the Court, the values have already been delivered to the Transport Company and to the Petroleum Company, and no mechanical or other difficulties exist opposed to a ruling that the status thus created should not be disturbed.

VI.

As to the Thekla and Other Admiralty Cases.

On pages 340 to 342 of our principal brief the attention of the Court has been called to the cases in admiralty, including the important recent decision of *United States* v. *Thelka* (266 U. S., 340) in which claims of private individuals, which could not be directly enforced against the United States, have been thus enforced where the United States itself becomes the actor and submits itself to the jurisdiction of the Court.

It is interesting to note that our adversaries do not even allude to these cases in their answering brief. The undisputed doctrine which they thus establish is submitted to be of much importance in the present case. Other cases in the same general connection, not heretofore cited in our brief, are:

Richardson v. *Sugar Co.*, 241 U. S. 44;
Porto Rico v. *Ramos*, 232 U. S., 627;
Gunther v. Railroad, 200 U. S. 274;
Clark v. *Barnard*, 108 U. S., 436,

in which the doctrine is laid down that the immunity from suit, which is a privilege of a sovereign, is voluntarily waived when it affirmatively becomes a party to a suit in a court which has jurisdiction of all matters connected with the subject matter of the action.

VII.

As to the Effect of Fraud Even If It Could Be Found to Exist, Upon the Defendants' Right to Credits.

May we in addition to the points already included in our principal brief, call attention to *Crocker* v. *United States* (240 U. S., at p. 81), one of the mail bag fraud cases involving bribery, in which this Court said:

> "It results that no recovery could be had upon the contract with the Postmaster General because it was tainted with fraud and rescinded by him on that ground. But this was not an obstacle to a recovery upon a *quantum valebat.*"

If an affirmative suit in the Court of Claims could be maintained against the United States despite bribery, we submit that in the present equity suit the Court should fully protect defendants' equities despite whatever findings could, under any circumstances, be made as to the existence of fraud or conspiracy.

VIII.

As to the Difference Between the Government's Sovereign and Commercial Capacities.

Our adversaries' arguments have not taken into consideration the fact that the Naval Reserve lands, upon their withdrawal from location, ceased to be public lands or in the public domain.

Barker v. *Harvey*, 181 U. S., 481.

They became dedicated to the functioning of a particular governmental agency which although—as is

the case with all governmental agencies—it acts for the benefit of all of the people, yet, nevertheless, in making voluntary contracts with private citizens, does so as a matter of commerce (*Cook* v. *United States*, 91 U. S., 389; *Bostwick* v. *United States*, 94 U. S., 53) and not in any sovereign capacity.

So clearly is the distinction drawn between the position of the Government as a sovereign on the one hand and as a private party and private litigant on the other, that an act done by it as sovereign does not defeat its rights as a private contracting party.

United States v. *Horowitz*, 267 U. S., 461.

IX.

As to the "Appellee's Statement of the Facts."

In our principal brief we presented, without argument, statement of what appeared to us to be all of the material facts, with appropriate record references in each instance, doing this complaint to the rule on the subject and for the purpose of assisting the Court, with the knowledge, of course, that the Court would have recourse to the record for verification of every material statement. We now note below a few instances which characterize the Government's "Statement of Facts," with the like knowledge that the Court will have recourse to the record of the real facts.

1. In stating the steps taken chronologically prior to the making of the contracts, Government counsel make no mention of the letter of April 12, 1922, from Secretary Fall to Secretary Denby recommending the seeking of further legislation. When in their brief they come, however, to what they call the "wilful dis-

regard of legal advice" (page 90) (under which head it is insisted that because Government officials construed the law differently from the construction thereof given by attorneys for private corporations, therefore the Government officials could not proceed to function under the law as they understood it without being subject to the charge of bad faith), counsel make their first reference to this letter of April 12, 1922, in these words (page 91):

> "By a letter dated April 12, 1922 (Pl. Ex. 102; R. I-393-394) Fall suggested to Secretary Denby that it would be advisable to obtain further legislation from Congress, in order to be certain of the legality of the plan. This request was not in good faith because at that very time, Fall was criticising Finney and Bain for not already having closed a contract with Doheny. Secretary Denby did not follow out the suggestion because Robison told him the Government was certain of a bid from Doheny, and that it was, therefore, unnecessary to have such legislation in order to get a bidder."

It will be noticed that counsel were meticulously careful to give reference to the pages of the record whereon the April 12th letter is found, but with care equally meticulous they refrain from giving any references to that part of the record where the Court could find that at that very time Fall was criticising Finney and Bain for not having closed a contract with Doheny, for the simple reason that the statement is entirely without foundation in the record. Finney and Bain testified on the subject. Finney, a witness for the plaintiff, on direct examination testified:

> "A few days before the Secretary's (Fall's) departure (on April 13th), Dr. Bain and Mr. Fin-

ney were in his office and Mr. Fall asked them how the proposed Pearl Harbor matter was getting along; they told him that the bids were not to be opened before April 15th; he expressed some disappointment, witness thinks, at that, stating that he desired to close the Teapot-Sinclair matter and this matter at the same time or about the same time, and was a little impatient, apparently, at the delay in the Pearl Harbor matter. Dr. Bain and Mr. Finney explained that the delay had been occasioned by the various changes which were made in the specifications; that it had been necessary to give considerable time to the Pearl Harbor matter so that the bidders could apprise themselves as to the conditions and that the last order had fixed April 15th as the day of the opening of bids and that bids could not be opened before that time. The Secretary did not make any suggestion as to any other way of closing the matter up other than by waiting until the bids came in and were opened." (R. v. I, 392.)

Let us now turn to *all* of the testimony of Dr. Bain on this subject, which we find on pages 771-2 and page 847 of volume II. That testimony we quote:

> "Secretary Fall left Washington for Three Rivers, New Mexico, April 13, 1922; some days before that he asked witness how they were getting along on the Pearl Harbor project, and stated that he had nearly completed the negotiations with the Mammoth Oil Company, which resulted in the lease of Naval Reserve No. 3. When Dr. Bain told Mr. Fall that nothing more could be done until after April 15th, he said, 'Well what have you been doing all this time, and why can't you?' Dr. Bain told him that after the change in the proposals of February 15, and the determination that no bids would be accepted except on a lump sum

basis, that it had been necessary to get out additional plans and details, which took some time, and to send out new proposals, and that since this placed on the contractor a very large responsibility, it was necessary to allow the contractor time to visit Hawaii or to have it visited, to determine the matters of foundations, sites, materials, labor, and things of that sort, before he could make a bid, and that accordingly the date for the receipt of those bids had been put forward to April 15. This apparently was the first time that Secretary Fall realized that the change in the original proposals involved material delay, and he expressed impatience over this. He asked witness whether there was not some way to facilitate action. He asked witness who was going to bid, and was told, to the best of Dr. Bain's knowledge, who would bid. Dr. Bain told the Secretary the Pan American, the Associated, and the Standard would bid, and that the Foundation Company and the Pittsburgh & Des Moines Steel Company would probably bid on parts of the work; he also told the Secretary about the connection that it was expected the engineering companies and oil companies would have; up to that time, the witness knew, not only that the White Engineering Company would bid in connection with the Pan American Company, but that Ford, Bacon & Davis would bid in connection with the Associated, and he told the Secretary that; he told the Secretary what he had understood from the representatives of the Foundation Company; as respects an arrangement with the Standard Oil, the witness cannot state positively that the Foundation Company's representatives told him that he had made an arrangement with the Standard Oil Company, but that representative said something which gave witness that impression." (R. v. II, 771-3.)

On cross-examination this witness, having identified a letter which he wrote to Mr. McLaughlin, vice-president of the Associated Oil Company, suggesting that Mr. McLaughlin come to Washington for conferences in advance of submitting a bid on April 15th, testified that—

> "letter was written after Dr. Bain's conference with Secretary Fall referred to in his direct examination, in which the Secretary expressed his anxiety to get the thing closed, and his impatience that it would have to wait until April 15" (R. v. II, 847).

It will be noticed immediately that nowhere in the foregoing is the name Doheny mentioned, nor, except for the fact that Mr. Fall was informed that the Pan American Company was expected to be one of the bidders, was there any reference to the "Doheny company." It is certainly unnecessary for us to do more than present the actual record, as above, to demonstrate the utter want of foundation for the statement that Fall was criticising Finney and Bain for not having closed a contract with Doheny.

As to the statement in the Government's brief, immediately following that which we have been treating, that Secretary Denby did not follow Mr. Fall's suggestion because Robison told him the Government was certain of a bid from Doheny and that it was, therefore, unnecessary to have such legislation in order to get a bidder, we quote this from the record:

> "Witness (Admiral Robison) saw the original of the letter from Secretary Fall to Secretary Denby, dated April 12, 1922, (Exhibit 102), recommending submission to Mr. Kelley of the

House of Representatives of an amendment to the then pending Naval Appropriation bill, and he talked with Secretary Denby on the subject of that letter shortly after its receipt; that conversation was that the bids were coming in in three days anyway, and witness believed that the promise that he had gotten from Mr. Doheny would be kept, and that under the circumstances he figured that the loss of time, which was vital, was unnecessary; that it would pay to wait three days before taking any action on Secretary Fall's letter, and then if there was not received any bids, that would be time enough to act, but if bids were received, why, this pessimistic view of the situation would be shown to be pessimistic; the Navy Department did not take any action on Secretary Fall's letter of April 12, 1922, and witness presumes it was placed in his files." (R. v. II, 1001-2.)

2. There is no justification for the statement made by counsel (page 96, Government brief) that "Doheny and the officials of his company" believed and acted on the belief that Fall had the power, and that the power to act rested in him alone, in respect of contracts relating to naval petroleum reserves. Indeed one of the outstanding facts in connection with the "negotiations and dealings up to the contract of April 25, 1922," was the insistence of Mr. Cotter, vice-president of the Transport Company, in charge of this matter, that Secretary Denby must be specifically a party in and to the contract (R. v. II, 424; 525; 528; 876; 915-16).

3. In their endeavor to uphold their contention that Secretary Fall originated the plan for exchanging royalty oil from the reserves for fuel oil and tanks therefor, Government counsel (brief, page 13) deny

that the *prior* discussion in Navy Council meeting had any connection with this subject or any reference to royalty oil or to the naval reserves. It is only necessary to turn to the record on the subject (V. II, 978), where will be found a stenographic report of the minutes of the Navy Council meeting in which Secretary Denby expressly refers to royalty oil (which could alone have come from the naval reserves) and Admiral Griffin responds that Secretary Fall said he was going to sound them out on that, obviously meaning, what later correspondence shows, that Secretary Fall intended to ask oil companies on the Pacific Coast if they would furnish storage for fuel oil in exchange for crude. What possible reference had "royalty" to the use by the Navy of its cash appropriations for fuel, and the purchase therewith of oil together with tanks in which to hold that oil? What possible connection had Secretary Fall with that matter?

4. On page 16 of the Government's brief it is stated that the words "or otherwise" in letter from Denby to Fall dated October 25, 1921, "*were not inserted by Denby,* as counsel for the Appellants *erroneously* state at page 25 of their brief." The record:

> "In point 5 in the policy letter, the last two words 'or otherwise' were not in the letter as originally written; those words were put in by Secretary Denby after the witness reported to him that Secretary Fall recommended it" (R. v. 2, 965).

5. On page 28 of the Government's brief it is stated that before Fall left Washington on December 1, 1921, he handed Doheny's proposition (contained in the latter's letter of November 28, 1921) to Bain and

told Bain to try his hand at evolving a plan along those lines. A statement intended to convey the same impression is also made on page 29 of the brief. The record:

> "To the best recollection of the witness, Secretary Fall had handed the letter of November 28, 1921, to him; witness does not remember what Mr. Fall said when he handed witness that letter, but the Secretary had told witness shortly before that, that either he had asked Mr. Doheny or Mr. Doheny had volunteered to have, an estimate made of the cost of putting up storage to the extent of a million and a half barrels, and that estimate, such as it was, appeared in the letter of November 28, 1921.
>
> "Secretary Fall, before he left Washington for the West on December 1st, had told Dr. Bain to prepare a plan for carrying out the wishes of the Navy, and when the various papers referred to came along, including the letters of December 9th and December 14th from the Navy (Exhibits Nos. 62 and 66), which came to Secretary Finney after Secretary Fall had left, they were turned over to the witness with instructions to try to work out a plan which would accomplish what the Navy wanted, and it was pursuant to these instructions that witness asked Mr. Finney to write the letter of December 16th to Cotter." (R. v. II, 719.)

And on cross-examination:

> "as to the November 28th letter, Dr. Bain's only recollection on that is that at the time Secretary Fall went away, he handed Dr. Bain the estimate made by Mr. Doheny's engineers; that was the only thing that stuck in his mind, and that is the letter of November 28th; before he went away, and at the same time he handed witness this paper, Secretary Fall gave witness instructions that

> when the Admiral and the Navy Department sent over the plans, '*we should proceed to develop a method of carrying out the Navy's wishes in this matter.*' "

And that throughout, it may be fairly said, was Fall's only instruction regarding any of the transactions here.

To cite that testimony as justification for the statement that Fall instructed Bain to try his hand at evolving a plan along the lines of Mr. Doheny's November 28th letter is so far-fetched as to require no comment. As the Court now knows, Bain's instructions at all times were to assist the Navy in doing what the Navy wanted, and when, in Fall's absence, the Navy requested assistance to carry out a plan decided by the Secretary of the Navy on December 5, 1921, and not before, Bain proceeded "to develop a method of carrying out the Navy's wishes" in the matter.

6. On page 55 of the Government's brief it is stated that it was quite obvious that the Foundation Company, and an other engineering concern, were unable to make arrangements to dispose of royalty oil and therefore nothing was heard from them after they got plans and specifications. We do not know from what this alleged fact becomes obvious as the only evidence on the subject comes from a letter written by the Foundation Company, in which that Company states:

> "In connection with the proposed construction work in Hawaii, which we understand is to be paid for in crude oil * * *, *we have an assurance of a source of disposal of this oil,* and, therefore, request a set of plans and specifications for the work proposed with a view to making you a formal tender on it." (R. v. II, 881.)

Until the bids were opened April 15th it was expected that the Foundation Company would submit a bid (R. v. II, 770; 881). And bids from that company and from the Pittsburgh & Des Moines Steel Company were expected until the moment of the opening of the bids (R. v. II, 771). Indeed, a representative of the last named Company was present at the time bids were opened (R. 771).

7. The words in italics in the following paragraph are omitted from the *quotation* made from the record on page 65 of the Government's brief, the subject being the proposition contained in Mr. Doheny's October, 1922, memorandum suggesting the construction of pipe lines and a refinery on the Pacific Coast:

> "Admiral Robinson testifies that when 'this proposition was originally brought to' his attention, 'by Secretary Fall,' as stated in the foregoing memorandum, Secretary Fall told the witness that Mr. Doheny was much concerned over the state of the oil market in California, and had some sort of a proposition to advance looking toward the stabilization of prices that might be made to the Government's advantage, as well as to his own; witness told Secretary Fall that anything that came 'to our advantage' was of interest to witness and that is about all there is to it, because the witness was not furnished with any details; *witness does not remember exactly what, if anything, Secretary Fall said with regard to the Navy's interests or part in that matter, but there was no question that it was a matter for Naval decision.*" (R. v. II, 1021-2.)

8. It is stated on pages 69-70 of the Government's brief that we attack the Government's contention that Fall and Doheny, dealing directly and personally, fixed the royalties of the December 11th lease, but that we (defendants' counsel) "do not refer to Robison's testimony (R. III-1131-32) that Fall told Robison that 'he (Fall) and Mr. Doheny had been in personal contact on the subject * * *.'" It is only necessary to refer to pages 230-233, inclusive, of our brief to show that we devote a whole chapter to this subject, to Robison's recollection of what Mr. Fall had said to him, and to our refutation by documentary evidence from the Government's own files of the Government's unfounded contention that there had been any personal or direct dealings between Doheny and Fall as regards this matter.

9. One more illustration: On page 88 of the Government's brief, in quoting in black face type from an official document, which quotation is made for the purpose of upholding the claim that these contracts were improperly kept secret, counsel close their quotation just prior to, and without including, the following found in the same document:

> "As a matter of fact, the contracts have been recorded as public documents and are, therefore, available to any citizen of the United States who will expend the trouble and funds necessary to obtain copies in the customary official manner." (R. v. II, 888.)

But we must not further burden the Court. The above instances are but typical. They serve to illus-

trate the necessity of that recourse, which we know the Court will have, to the record for the facts.

Respectfully submitted,

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